Joe Thomson and Contract Law in Scotland

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To say that I rise to give this lecture with mixed feelings is probably the under-statement of my career so far. Joe Thomson and I were friends for over 30 years, and for quarter of a century we first brooded over, then finally executed and carried on with a joint project for a textbook, *Contract Law in Scotland*, which has so far run to four editions.[1] But our friendship was about much more than contract law and indeed law altogether. This is not the time or place to share a range of personal memories of Joe but, in the words of Pamina in *The Magic Flute*, I do indeed feel it: he has vanished. The store of recollections cannot quite fill the gap left in my life by his passing.

It is however an honour and a challenge to be asked to say something about his contribution to the subject of contract law in Scotland, which was considerable and is likely to be enduring. In the time available, however, I will concentrate on his earliest contributions, which may anyway be less familiar to the present audience, although they were the means by which as a law student in the 1970s I got to know about Joe, long before we ever met. This means that I won't deal tonight with inter alia Joe's views on good faith and equity in contract generally, his extensive work on the interaction of contract with other obligations (especially delict and especially misrepresentation), or his controversial take on the nature of unilateral promises.[2] Perhaps another lecture will be needed.

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* Professor of Private Law, University of Edinburgh. This is the slightly revised text of the first Juridical Review Lecture, delivered in Edinburgh City Chambers on 14 November 2018. Another version was delivered in Aberdeen Law School on 20 November 2018. I am grateful to both audiences for stimulating discussions of the subject and his influence on law in Scotland. In this written version I have tried to retain something of the informal nature of a public lecture.

[1] H L MacQueen and J Thomson, *Contract Law in Scotland* (1st edition 2000; 2nd edition 2007; 3rd edition 2012; 4th edition 2016).

[2] See e.g. the following works by Joe: "The Role of Equity in Scots Law", in S Goldberg (ed), *Equity and Contemporary Legal Developments* (1992) 910; "Good Faith in Contracting: A Sceptical View", in A D M Forte (ed), *Good Faith in Contract and Property Law* (1999) 63; "Fraud", in T B Smith (ed), *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 11 (1989), paras 701-789; "Obligations Ordinary" in E Lomnicka and C J G Morse (eds), *Contemporary Issues in Commercial Law: Essays in Honour of Professor A G Guest* (1997) 195; "Delictual Liability between Parties to a Contract", 1994 SLT (News) 29; "Damages for Misrepresentation", 1997 SLT (News) 301; "Misrepresentation", 2001 SLT (News) 279; "Judicial Control of Unfair Contract Terms" in K Reid and R Zimmermann (eds), *History of Private Law in Scotland* (2000) vol 2, 157; (with L J Macgregor) "2001 – A Scots Lawyer's Odyssey", in D J Hayton (ed), *Law's Future* (2000), 93; "Promises and the Requirement of Writing", 1997 SLT (News) 284; "Restitutionary and Performance Damages" 2001 SLT (News) 71; "Illegal Contracts in Scots Law", 2002 SLT (News) 153;

Some biography is a necessary preliminary to this one.[3] Joe graduated from the Faculty of Law in Edinburgh in 1970 with a first-class Honours LLB, winning in addition the Lord President Cooper Prize for the most distinguished graduate in his year. His studies began in October 1966, a mere five years after the introduction of the full-time Honours LLB as a first degree open to school-leavers such as Joe. His years of university study came during the era when the leading lights of the Edinburgh Faculty included T B Smith (Professor of Civil Law until 1968, thereafter of Scots Law, while also serving as a part-time Scottish Law Commissioner) and George Montgomery (whose retirement from the Scots Law chair paved the way for T B Smith's move across from Civil Law). In 1968 Alan Watson filled the Civil Law vacancy left by Smith, moving over from Glasgow to do so.

Alan, who died on 7 November 2018,[4] played a key role in Joe's intellectual development, a point I will elaborate later. Joe took his Honours Civil Law class in 1969-70, and Alan remained a friend for the rest of Joe's life. He contributed to the Watson festschrift published in 2001;[5] and he liked to point out that his very first publication was one on the Roman law of delict, albeit that it was apparently the essay he wrote for the Civil Law Honours class.[6] Another Roman law article, on property, appeared in 1975, in no less august a journal than the *Law Quarterly Review*.[7] There, intellectual debts to Professor Watson were fulsomely acknowledged along with others to Professors Ben Beinart and Peter Stein. So during his early academic career Joe was moving in very distinguished Roman law company indeed.

Joe did very well in almost all his University subjects from the beginning. His highest first-year mark was in the Scots Law I degree exam. It was taught essentially in two parts: one by Campbell Paton on the sources and institutions of Scots law, the other on the law of contract, taught by Professor Montgomery. The latter's lectures however famously consisted of dictation from the relevant chapters of *Gloag & Henderson*, a style of teaching reflecting the fact that Montgomery was a survivor from the LLB's pre-1961 era, having held his chair since 1947. Some of Joe's characteristic irreverence must have been shaped by the boisterous reaction of

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Scots Private Law (2006), chapters 1, 5-9 (especially chapters 1.05-1.07, 5.11-5.22, 6.03, 6.06-6.08, 7.10-7.17, 9.03-9.04).

[3] Most of the information in what follows is derived from Joe's student record as preserved in the University of Edinburgh Law School and from the annual *University Calendar* for the period 1966-1970.

[4] Just a week before this lecture was first delivered. Unfortunately I did not have any opportunity to talk to Alan about Joe during the lecture's preparation.

[5] J Thomson, "Legal Change and Scots Private Law", in J W Cairns and O F Robinson (eds), *Critical Studies in Ancient Law, Comparative Law and Legal History* (2001), chapter 31.

[6] "Arra in Sale in Justinian's Law", [1970] Irish Jurist 179.

[7] "Who Could Sue on the Lex Aquilia?" (1975) 91 LQR 217.

Professor Montgomery's classes, in particular its graduate group, to his lecturing style.[8]

It was however essentially in Gloag's words that Joe first learned Scots contract law, and there could hardly have been a more learned and authoritative author on that subject, even thirty years after his death. *Gloag on Contract* (second edition, 1929) was listed in the recommended reading for the course along with *Gloag & Henderson* in its sixth edition of 1956, T B Smith's *Short Commentary* and *Studies Critical and Comparative* (both 1962), and (a bit surprisingly) Gow's *Mercantile Law* (1964). The course itself covered all the usual ground of contract law in the order to be found in *Gloag & Henderson*, along with capacity to contract and what was called "quasi-contract". It finished with extinction of obligations which, I think, must have concluded with negative prescription, for reasons I will explain later. Joe's second rather than first class merit in the course was probably to be explained by a slightly weak performance in the first class exam (i.e. on the sources and institutions part of the course), but he did much better in the second class exam (i.e. on the contract part of the course as far as the end of the second term), suggesting that he enjoyed that subject rather more.

Although as class medallist and winner of a first class merit certificate in the subject Joe evidently relished Criminal Law under senior lecturer Dr G H Gordon, his heart from the beginning must have been given over mainly to private law. That included Mercantile Law, in Joe's second year (1967-68). In this subject too he achieved a first-class merit certificate and (jointly) the class medal. The course began, according to the *University Calendar* for the year, with "a study of the Law Merchant and the Law Maritime, their origins and history"; but then came "the general laws of contract and agency governing mercantile affairs"; and the "particular laws" of sale, carriage, charter-parties, bills of lading, bills of exchange and cheques.[9] All would help to deepen and widen Joe's knowledge and understanding of contract law.

It was not in Mercantile, however, that Joe was first exposed to the lecturing (as opposed perhaps to the tutoring in that and other subjects) of his Director of Studies, Bill Wilson, then a senior lecturer in the Faculty and its Associate Dean.[10] Bill's lecturing must have been first encountered in Scots Law II, where he was responsible for the section of the course dealing, in the words of the *University*

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[8] On Montgomery, see D A O Edward, "Scottish Legal Education and the Legal Profession", in H L MacQueen (ed), *Scots Law into the 21st Century* (1996), 50, 58.

[9] The course went on to cover also partnership, bankruptcy, companies, insurance, industrial property and copyright.

[10] On Wilson's life and work, see H L MacQueen, "Memoir of Professor William Adam Wilson, MA, LLB, LLD, FRSE", and idem, "The Contribution of W A Wilson to Scots Law", both in idem (ed), *Scots Law into the 21st Century* (1996), 1, 10. For a story about Wilson's innovative tutoring style relayed to me by Joe, see "Memoir", 5 note 26.

Calendar for 1967-68, with "reparation; National Insurance (Industrial Injuries) Act 1965; [and] defamation".

Also to be heard in Scots Law II in 1967-68 (possibly for the first time) was Mr Eric Clive, lecturer, talking about husband and wife (for which the recommended book was the third edition of *Walton*, published in 1951), the financial consequences of divorce, and parent and child.[11] But the Scots Law II course apparently and rather oddly began with positive prescription (my speculation is that this was because Scots Law I ended, as previously mentioned, with negative prescription). Other subjects covered included succession, trusts, property law, and master and servant. Most if not all of this was still the responsibility of Professor Montgomery, also named as contributing to the course in the *University Calendar*. But Joe clearly found it all to his taste: he was awarded a Thow Scholarship for his performance in the class.

A crucial point emerging from this narrative of Joe's LLB years is the relatively limited exposure that he had to the teachings of T B Smith and his "neo-Civilian" approach to Scots private law, particularly when it came to the exposition of the actual law of Scotland. In Joe's first year he took the course known as Civil Law and Jurisprudence, taught by Smith along with Professor Archie Campbell and three lecturers. The coverage of the Civil Law element was described in the *University Calendar* as

> "The development of law in early society; history and sources of Roman private law; *outline of its main principles* (emphasis supplied); mediaeval reception of Roman law and its influence on modern systems; codification; historical development of English common law and its reception abroad; Scots law as a "mixed" system; other legal systems of the modern world."

Further, students were "expected to have studied closely for the Roman Law part of the course either Lee, *Elements of Roman Law* (4th ed.) or Nicholas, *Introduction to Roman* Law, together with the *Institutes* of Justinian, omitting the topics of slavery and succession." All this, and especially the omission of succession and slavery, surely reflects Smith's approach to the responsibilities of the Civil Law Chair. Roman law as such received relatively slight treatment, and there was greater emphasis on how much it had influenced contemporary law, probably with English law being presented as the exception to the rule.

The choice of courses in Joe's Honours years was somewhat limited by comparison with even my own student time eight years later. There were just fifteen altogether, including the compulsory Conveyancing. There were no Honours courses in either contract or delict, although Eric Clive offered one in husband and wife. In 1968-69 Joe took Conveyancing along with Jurisprudence and History of Scots Law (taught in old-fashioned dictation manner by Campbell Paton). Joe

[11] Eric Clive has no particular recollection of Joe as a student except for Bill Wilson's enthusiasm about his ability and potential (personal email, 6 November 2018).

achieved straight As in these subjects (including the wonderfully mystifying grade of A?+ in Jurisprudence).

A similar performance followed in 1969-70, in International Private Law Honours and Criminal Law in 1969-70, while he achieved a BA (another mysterious grade on the borderline between first and upper second class) in the Civil Law Honours course which had just been introduced that year by the new Professor of the subject, Alan Watson. There had been no such course under T B Smith, who had offered instead Honours courses in Comparative Law and (reflecting his position as a Scottish Law Commissioner) Scots Law Reform. These however Joe passed by in favour of Civil Law. Watson's quite distinct emphasis can be readily detected in the *Calendar* entry for his new course:

> **Civil Law Honours**
> Digest title (until further notice, D.9.2., *Ad legem Aquiliam*). *Either* (i) Roman Public Law *or* (ii) Law of Actions and Selected Topics in Roman Legal Science, particularly in the field of transmission of texts and development of sources of law.

Alan Watson was a strong opponent of Smith's approach to Civil Law (Smith of course reciprocated with a deep dislike of Watson's focus on classical Roman law).[12] Some of the others who taught Joe were also not adherents to Smith's "neo-Civilian" crusade. Bill Wilson was more sceptical of Smith's approach than an outright opponent; but, apart from ironic emphases and the occasional dryly humorous aside, he eschewed flourish and rhetoric in his teaching and focused on detailed analysis of the logic of the authorities, and in particular legislation, in order to determine what the law was rather than what it had been or it ought to be. In 1966 he published an argument that there was little distinctively Scottish about commercial law.[13]

Eric Clive in 1976 would famously remark on the absurdity of having different family laws within the United Kingdom, indeed across Western Europe. He added (in the context of the then current debate about legislative devolution for Scotland):

> I do not … agree with the statement in the White Paper that "extensive devolution is particularly appropriate" in relation to private law. The fact

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[12] On Smith's approach to Civil Law see The Hon Lord Hunter, "Thomas Broun Smith 1915-1988" (1994) 82 Proceedings of the British Academy 455, 461. Cf A Watson, "David Daube: A Personal Reminiscence", in E Metzger (ed), *David Daube: A Centenary Celebration* (2010) 127, 137. It is worth noting that after his appointment at Edinburgh Watson began to publish extensively on Comparative Law and general legal history as well as classical Roman law: see an incomplete list of his publications up to 2006 at http://www.law.uga.edu/profile/alan-watson (last checked 28 November 2018).

[13] W A Wilson, "Scottish Commercial Law", [1966] JBL 320. T B Smith would probably not have disputed this view very strongly.

> that there have been separate legal systems in the United Kingdom in the past does not mean that it is "particularly appropriate" that this inconvenient arrangement should continue. If the great devolution debate leads to a discrediting of the Treaty of Union and if that in turn leads to a dispassionate re-examination of the question of whether we need or desire separate systems of private law in the United Kingdom then the debate will have served some useful purpose.[14]

My purpose in making these observations is not to explore or comment on these different views but rather to suggest that they contributed to the shaping of Joe's own thinking about and approach to Scots private law in general. In so far as there was debate within the Edinburgh Faculty in the 1960s about the "neo-Civilian" approach, Joe was clearly for the negative from early on. This is most apparent in his decision not to take any of Smith's Honours courses; but there is also much to be gleaned from his contributions to the volumes published many years later in honour of his erstwhile teachers.

Joe's contribution to the collection honouring the memory of Bill Wilson, published in 1996, was entitled "When Homer Nodded?"[15] Writing in strong terms, he criticised Wilson's late recantation of his scepticism about the "neo-Civilian" approach as preached by T B Smith. Wilson's remarkable article had included the following sentences:

> A legal system which has no doctrinal foundation must drift. It may be under the delusion that it is proceeding in the light of pure reason. The law teachers are to blame, the present writer included.[16]

While Joe accepted that "the systematization of legal rules into a coherent, rational structure has for centuries in Western civilization been a hall-mark of a mature culture", he argued that traditional forms of legal exegesis broke down in the face of contemporary complexity as legislation was deployed to further social and economic policies. "Modern Scots law cannot be systematically expounded as a set of interlocking, internally consistent principles. … [S]cholars must accept that the developments in the nineteenth and twentieth centuries constitute contemporary Scots law – warts and all!" Study of the Civilian tradition did not provide a rational foundation for contemporary Scots law, although a course on Roman private law, with its "overview of a relatively simple legal system which can be seen in the round", could show the student that the law was indeed an interlinking whole.[17]

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[14] E M Clive, "Scottish Family Law", in John P Grant (ed), *Independence and Devolution: The Legal Implications for Scotland* (1976), 162, 174.

[15] "When Homer Nodded?", in H L MacQueen (ed), *Scots Law into the 21st Century* (1996) 19.

[16] W A Wilson, "The Importance of Analysis", in D L Carey Miller and D W Meyers (eds), *Comparative and Historical Essays in Scots Law: A Tribute to Professor Sir Thomas Smith* (1992), 162, 171.

[17] For the quotations in the foregoing, see "When Homer Nodded?", 25-27.

As the editor of this piece, I thought at the time that there were some tensions and contradictions within Joe's argument; a rejection of wholeness in contemporary law while at the same time making a claim that wholeness could still be perceived if only we changed our teaching methods the better to demonstrate it. I will return to this point when I discuss Joe's contract scholarship more specifically later.

In his contribution to the Watson festschrift, Joe picked up certain themes of the honorand's later work going beyond the study of pure Roman law: legal transplants, or borrowing of material by one system from another, as a major factor in legal change through history, and the lack of any necessary connection between legal and social change if not indeed between law and society in general.[18] Joe argued from examination of change in Scots private and criminal law that, while change in the former by the courts purported to be consistent with underlying legal doctrines, this was generally little more than a fiction. The main engine of legal change was legislation, which did not need to be, and often was not, consistent with established rules and principles, and yet was frequently (although not always) successful. "Doctrinal purity," Joe wrote, "has never been a feature of Scots law, whatever those with nationalist sentiments may feel."[19]

We should also note the influence of Alan Watson in a paper Joe published in 1995 entitled "Scots Law, National Identity and the European Union". In this, he argued that the link between the legal system's rules of private law and the mores of society was "at best, tenuous".[20] The rules were developed by lawyers rather than through social change, and could evolve and be reformed "without undermining anything which is essential to the Scottish national identity". But –

> [T]he fact that the law is contained in Scottish legislation and is to be enforced by Scottish lawyers in Scottish courts is important in reinforcing our sense of national identity. In short, it is my contention that while the substantive content of Scots law is unimportant in this context, the Scottish national identity would be severely undermined if Scotland was to lose its separate legal system.[21]

The short bibliography to this contribution included Watson's *Legal Transplants* and *Society and Legal Change* amongst a list of six items altogether, and anyone familiar with these works will recognize their themes in Joe's remarks.

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[18] See A Watson, *Legal Transplants: An Approach to Comparative Law* (1974); A Watson, *Society and Legal Change* (1977).
[19] "Legal Change and Scots Private Law", 391.
[20] J M Thomson, "Scots Law, National Identity and the European Union", [1995] *Scottish Affairs* 25, 29.
[21] Ibid, 31.

Immediately upon his Edinburgh graduation in the summer of 1970, Joe was appointed to a lectureship in law at the University of Birmingham. This was a significant shift, not only of jurisdiction, but also of direction. Joe told me that his initial ambition was to go to the Scottish bar but I never asked him how and why that came to change. My unconfirmed suspicion is that it was most probably Alan Watson who planted the idea of an academic career in Joe's mind. The new Dean of Law at Birmingham, and its Barber Chair in Law, was L Neville Brown, a comparative and family lawyer who in his early career had taught Roman along with Comparative Law. He was also known to Alan Watson from time together at Tulane in New Orleans (Louisiana). Brown took a serious interest in mixed or hybrid legal systems and in the 1960s had become aware of Scots law as such a system through working with Sandy Anton (then of Glasgow). Brown also thought that the UK's impending membership of the European Community would make Community law another mixed system.[22] Whether any of this led him and his appointing committee to fill their vacant post with a brilliant young Scotsman educated in a mixed system is unknown. It must have been something of a gamble on both sides; but it was one that certainly paid off for Joe.

The earliest publications from Joe's pen apart from the Roman law articles already mentioned were mostly case notes in the *Law Quarterly Review*, some of them on Scots law topics but more of them on English cases and in particular on English labour law cases. This reflects one of his lecturing commitments at Birmingham but it would have an important impact upon his later general contract law scholarship. He also co-authored a number of pieces with a Birmingham colleague, Frank Wooldridge, although these all appeared some time after Joe had moved on to King's College London (henceforth KCL) in 1974. At Birmingham Joe seems to have taught entirely English law, including Equity and Trusts; but not Contract as such. Nonetheless it was in Birmingham that he connected with Gordon Goldberg, an Australian barrister who had turned to academe in England, and with whom Joe would enjoy a fruitful collaboration on English contract law. Also at Birmingham as Professor of English Law in Joe's time was Gordon Borrie, later a very prominent Director General of Fair Trading with whom Joe remained in touch long after both had moved on to pastures new.[23]

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[22] On Brown see his memoir, "Confessions of a Comparatist" (1985) 10 Hold LR 63, reprinted as Appendix A in Geoffrey Hand and Jeremy McBride (eds), *Droit Sans Frontieres: Essays in Honour of L Neville Brown* (1991). Note also L Neville Brown, *Law without Frontiers: Memoirs of a Comparatist* (privately printed, 2004), a reference I owe to Professor John Cairns.

[23] I am grateful to George Applebey, who joined the Birmingham Law Faculty in 1973, for much information about Joe in his Birmingham years. J Bosworth, *The Birmingham Law Faculty: The First Sixty Years* (1988), 33-38, provides some context for the Faculty in the 1970s but, like Neville Brown's memoirs, makes no reference to Joe Thomson. Bosworth's account is up-dated to 2008 in the web publication (https://www.birmingham.ac.uk/Documents/college-artslaw/law/80/80YearsofLawatBirmingham.pdf).

Another significant event for Joe at Birmingham was his meeting there with Ben Beinart, good friend of both Neville Brown and Alan Watson. Beinart, the W P Schreiner Professor of Roman and Comparative Law at Cape Town, was an academic visitor in residence at Birmingham in 1969 and 1973,[24] and must have encountered Joe in more than the ordinary social way on the second visit. It was probably then and afterwards that he helped Joe with the article on the *lex Aquilia* that appeared in the LQR in 1975. Joe later recalled Beinart's wise advice: "It doesn't matter if you are wrong provided you make a contribution."[25] Beinart's liking for Birmingham was shown by his taking up a Barber Chair there in the same year (albeit after Joe had left for King's College London) and going on to become its Law Faculty Dean a year later in succession to Neville Brown. The Beinart festschrift, published in three successive volumes of the *Acta Juridica* from 1976 to 1978, included papers from four men whose connection with the honorand came through Birmingham: three of its stalwarts in Neville Brown, Wooldridge, and Robert Pennington, plus the youthful Joe Thomson. Although Joe's contribution makes no mention of Beinart, the latter must have esteemed him enough academically for the invitation to contribute to be made. And as we will shortly see, Joe certainly put his very best foot forward in that article, which is on the effect of error in the Scots law of contract.

It is almost time to turn to Joe's scholarship on contract law in Scotland! He began to produce this after he arrived in KCL in 1974, where he would remain as a Lecturer in the Laws of Europe, based in the Law School's newly founded Centre for European Law, until his departure for a chair at Strathclyde in 1984.[26] Those ten

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[24] See "Ben-Zion Beinart: Curriculum Vitae and List of Publications", [1976] Acta Juridica, xx.

[25] J Thomson, "Northern lights: Some Personal Reflections on Scottish Legal Scholarship", [2014] JR 83, 92.

[26] Joe appears under this designation in every listing of Faculty of Laws staff in the annual KCL Calendar from 1974-75 to 1983-84. The Centre for European Law was established at KCL in 1974 following the UK's accession to the European Economic Community in 1973. The file on its founding in the KCL Archives (KFL/FS2) shows that the prime mover behind its foundation was R H Graveson, Professor of Private International Law, strongly supported by Professor A K R Kiralfy, Dean of the Faculty of Laws, a legal historian and comparatist. The first Director of the Centre, however, was A G Chloros, Professor of Comparative Law in the University of London since 1966, who was to become the first Greek judge in the European Court of Justice in 1981. The Centre's focus was not intended to be limited to EEC law, although at its beginning Francis Jacobs was appointed to a Chair of European Law in the Centre which was indeed meant to be for an EEC law specialist; Jacobs also succeeded Chloros as Director in 1981. The Centre was however also to consider the law of other countries in Europe or influenced by the European legal tradition, and to encourage knowledge of the Common Law in other European countries. Lecturers (initially three, of whom Joe was one) were appointed with these latter aims primarily in mind. I am grateful to the KCL Archives service for permission to refer to this material. The Centre for European Law continues today, but appears to be

years were a very productive period in which he engaged with English and EEC law as well as continuing his prolific case notes for the LQR and becoming assistant to the journal's editor (P V Baker QC) in 1980.[27] From what Joe told me, a major inspiration on the private law side at KCL was the Professor of English Law, Tony Guest, who "has an innate capacity for renovating flagging, almost deceased legal works": the editor of *Anson's Law of Contract* (four editions 1969-84), *Chitty on Contracts* (five editions 1968-94), *Benjamin's Sale of Goods* (six editions 1974-2006), and *Chalmers on Bills of Exchange* (four editions 1991-2009). Guest's first year contract lectures at KCL were apparently "universally known as 'The Tablets'", presumably because of their divine authority.[28] Joe would contribute to a festschrift for Guest published after the latter's retirement in 1997 but unfortunately said nothing specific there about the nature of his inspiration beyond paying tribute to his greatness as a common lawyer.[29]

Amongst many other publications from this period, Joe's two articles on the Scots law of contract form a small (but, I will suggest, not a minor) part of his output. They were on significant topics: one on fundamental breach, published in the *Juridical Review* in 1977; the other, on error, was his contribution to the Beinart festschrift already mentioned. I don't propose to go into the detail of all their arguments on this occasion. What is of more general interest is the approach they evince. Both are thorough analyses of the Scottish case law on their subjects, attempting to weld the authorities into a coherent and rational whole. Joe's knowledge and understanding of English law was crucial in these exercises.

The article on fundamental breach was explicitly a comparison of Scots with English law. "Whatever may have been the position historically," wrote Joe of Scots law (for that citing T B Smith's *Short Commentary*), the leading case of *Wade v Waldon* had decided in 1909 that the right to rescind only arose in relation to a term of a contract breach of which went to the root of the contract. There was therefore "now little difference" between this Scottish rule and the English rule that a party is entitled to rescind after the breach of a fundamental term or condition. Indeed, "the only difference is one of terminology."[30]

Further, contract terms which sought to prevent conduct amounting to a fundamental breach from doing so were allowed in both systems but treated very restrictively by the courts. Joe floated without pursuing in any detail the interesting

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entirely focused on European Union law (see its website, https://www.kcl.ac.uk/law/research/centres/european/index.aspx).

[27] I am very grateful to Annie Thomson for lending me a copy of a CV compiled by Joe in October 2001, which includes a comprehensive list of his publications to that date. I have attempted to complete the list through a Westlaw search supplemented by personal knowledge. I estimate from this that over his career Joe produced around 180 case notes.

[28] For the foregoing see Lomnicka and Morse (eds), *Contemporary Issues*, preface.

[29] "Obligations Ordinary", in Lomnicka and Morse (eds), *Contemporary Issues*, 207.

[30] "Fundamental Breach in Scots and English Law", [1977] JR 38.

idea that terms which effectively reduced a contract to nothing but a declaration of intent could be held contrary to public policy as a leonine bargain, citing as a possible "common solution" for both systems Lord President Cooper's dictum on that point in *McKay v Scottish Airways*.[31] Nevertheless, in a concluding footnote he took a quick side-swipe at the English and Scottish Law Commissions, where of course T B Smith was still a Commissioner:

> [I]t is hoped that this article has shown that the Commissions' statement … that "the doctrine of fundamental breach seems possibly to have been construed somewhat differently in Scots and English law, and the doctrine seems to have been considered by the Scottish courts only on rare occasions," is not an entirely satisfactory statement of the law.

Joe also showed that both systems allowed terms that prevented recovery of losses arising from fundamental breach, the question of whether they did so being one of construction of the contract. But the English courts had deployed a rule to the effect that, where the innocent party rescinded for the fundamental breach, the exemption term fell with the contract and could not apply to post-breach losses, the particularly notorious authority at the time being *Harbutt's Plasticine v Wayne Tank & Pump Co Ltd*.[32] Joe commented:

> Although this reasoning is consistent with the general principles of the Scots law of contract, hitherto Scots lawyers have seemed reluctant to put it to constructive use. … This aspect of fundamental breach is capable of achieving a just solution in such cases and should therefore be part of the armoury of Scots as well as English lawyers.

In a postscript, Joe criticised a new Scottish decision that seemed to go against this final argument.[33] But in the long run, the argument failed to gain purchase in the English and Scottish courts. *Harbutts*, a decision of the Court of Appeal led by Lord Denning MR, was hard to reconcile with the earlier decision of the House of Lords in *Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale*.[34] The passage of the Unfair Contract Terms Act 1977 undermined the need for a theory of fundamental breach to over-ride exclusion clauses in contracts. Early in the 1980s the House of Lords gave the final quietus to that idea in England and Scotland in *Photo Production Ltd v Securicor Transport Ltd* and *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd*.[35] In any case, there was much earlier

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[31] *McKay v Scottish Airways* 1948 SC 254, 263 ("It was not argued that the conditions were contrary to public policy, nor that they were so extreme as to deprive the contract of all meaning as a contract of carriage and I reserve my opinion on these questions …").

[32] [1970] 1 QB 447 (CA).

[33] *Alexander Stephen (Forth) Ltd v J J Riley (UK) Ltd* 1976 SC 151.

[34] [1967] 1 AC 361.

[35] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* 1982 SC (HL) 14. Joe noted these developments in

and strong House of Lords authority that contracts did not come to an end in the sense of ceasing to exist upon termination for breach.[36] Rather, as Bill McBryde put it, "on material breach the "innocent" party is, if he wishes, free from his obligations of future performance."[37] But the contract still exists for the purposes of regulating parties' relationship outside actual performance, e.g. damages liability, arbitration clauses.

Joe's interest in problems of breach of contract had been stimulated, I would suggest, by his engagement with labour law, and the problem of the employer's repudiatory breach of contract in wrongfully dismissing an employee. The English courts were wrestling with this issue in the 1970s. Did the inability of the employee to obtain an order for specific performance against the employer mean that the employer's breach automatically brought the contract of employment to an end, so that the general contract rule, to the effect that the victim of a repudiatory breach had to "accept" it for the contract to be terminated (the "elective" theory), did not apply?[38] Sir John Donaldson had held that an unaccepted repudiation nonetheless brought the contract of employment to an end in 1974.[39] In *Thomas Marshall (Exports) Ltd v Guinle* in 1978 Sir Robert Megarry V-C described the authorities as in a far from satisfactory state.[40] The issue would split the Court of Appeal in 1981, with the majority favouring but not definitively establishing the elective termination theory as the law, at least of England.[41]

Joe's line, however, was that in both employment contracts and contracts in general a repudiatory breach operated automatically to terminate a contract *unless* the victim chose to waive the breach and affirmed the contract. There was no "elective" requirement of the victim's acceptance of the breach.[42] As always, the argument was presented with great clarity and extensive reference to authority. But again in the longer run the argument did not prevail, although only in 2012 did the

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"The Effect of Exemption Clauses", (1983) 99 LQR 163, and "Final Demise of Fundamental Breach" (1983) 99 LQR 492.

[36] *Heyman v Darwins Ltd* [1942] AC 350 (with which Joe's "The Effect of a Repudiatory Breach" (1978) 41 MLR 137, 143-4, grapples somewhat selectively).

[37] W W McBryde, "Breach of Contract", 1979 JR 60, 116 (2 parts), 137. Joe accepts this point in *Scots Private Law*, chapter 6.03. See also *Contract Law in Scotland* (4th edn) chapter 5.27, 5.48-5.51.

[38] See D Cabrelli and R Zahn, "The Elective and Automatic Theories of Termination at Common Law: Resolving the Conundrum?", (2012) 41 Industrial LJ 346.

[39] *Sanders v Ernest A Neale Ltd* [1974] ICR 565, 571.

[40] *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227.

[41] *Gunton v Richmond-upon-Thames London Borough Council* [1981] Ch 448.

[42] See two articles by Joe on English law: "Repudiatory Breach, Illegality and Contracts of Employment", (1975) 38 MLR 346; "The Effect of a Repudiatory Breach" (1978) 41 MLR 137.

UK Supreme Court hold decisively (despite a powerful dissent from Lord Sumption) in favour of the elective over the automatic theory in employment contracts.[43]

On the other hand, Joe's contribution to the Beinart festschrift is in my opinion his masterpiece, at least in contract law, and one that has had influence in the subsequent development of the law.[44] The subject is the vexed one of the effect of error in contract, much debated in the literature since at least the second edition of *Gloag on Contract* in 1929.[45] Joe's opening states an agenda:

> The views of most commentators is [*sic*] that the Scots law of error is now confused and unsatisfactory, another example of an 'unsatisfactory emulsion' of civilian and common-law rules. But it is the present author's opinion that much of this confusion arises from the fact that academic writers in Scotland continue to discuss the law of error from the traditional civilian viewpoint which is, it is submitted, no longer appropriate. … It is the purpose of this paper to demonstrate that, if the traditional civilian systematization of the rules is abandoned, the Scots law of error can be seen to consist of a coherent set of principles which is not unworthy of a modern legal system.[46]

His conclusion reinforces this with a further observation drawing upon another article Joe had co-authored with Gordon Goldberg on English law, entitled "The Effect of Mistake on Contracts":

> Shorn of its civilian trappings, the similarity between the Scots law of error and the English law of mistake becomes much more obvious.[47]

In all this, Joe was very largely flying in the face of the conclusions that had been drawn in the 1950s by, first, J J Gow and then T B Smith.[48] He was not the first to do so: in 1957 Peter Stein had at least qualified the views of his erstwhile

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[43] *Société Générale (London Branch) v Geys* [2013] 1 AC 523, noted by D Cabrelli and R Zahn, "The Elective and Automatic Theories of Termination in the Common Law of the Contract of Employment: Conundrum Resolved?", (2013) 76 MLR 1106.
[44] "The Effect of Error in Contract", [1978] Acta Juridica 135.
[45] See W M Gloag, *The Law of Contract: A Treatise on the Principles of the Law of Contract in Scotland* (2nd edn, 1929) chs XXVI and XXVII. For an important early discussion of Gloag's views, see F H Lawson, "Error in Substantia", (1936) 52 LQR 79.
[46] "Effect of Error in Contract", 135.
[47] "Effect of Error in Contract", 151 (citing G D Goldberg and J M Thomson, "The Effect of Mistake on Contracts" [1978] JBL 30, 147 (2 parts)).
[48] J J Gow, "Mistake and Error", (1952) 1 ICLQ 472; "Some Observations on Error", (1953) 65 JR 221; "Culpa in Docendo", (1954) 66 JR 253; and *Mercantile and Industrial Law of Scotland* (1964), 52-63; T B Smith, "Error in the Scottish Law of Contract" (1955) 71 LQR 507; *Short Commentary on the Law of Scotland* (1962), 808-835.

colleagues at Aberdeen,[49] while in the 1970s Bill McBryde too was working on the history of the law to argue that to be relevant to invalidate a contract error had generally to be shared by the parties or induced in one of them by the misrepresentation of the other.[50] There might be exceptions to that generalisation but such cases were rare in the modern law.

Joe's line was that the subject of error divided into two distinct parts. First, there were errors which prevented the formation of any contract at all, a matter to be determined objectively on the evidence of the exchanges between the negotiating parties. This might be because purported acceptance did not meet the preceding offer;[51] or because it could be shown that the parties had different understandings of what they were contracting about and the court could not determine which understanding was to be preferred objectively.[52] Again, in the classic case of *Morrisson v Robertson*, Morrisson thought he was selling on credit to Wilson of Bonnyrigg via the latter's agent; but the "agent" was a rogue who had no authority to act for Wilson, who in turn knew nothing of the transaction. Objectively there was no contract between Morrisson and Wilson, and certainly none between Morrisson and the rogue.[53]

In other cases, however, a contract came objectively into existence but subject to an error of one or more parties going to the root of the contract. Then the apparent contract might be avoided provided that it was equitable so to do. The latter group of cases itself divided into two categories: uninduced error (or error simpliciter) and induced error, i.e. error of one party caused by another party's misrepresentation. The uninduced error might be shared by the parties, or it might be the error of one only; but the plea rarely succeeded in cases of the latter type.[54] Joe characteristically rejected the argument that the rare successes (such as *Steuart's Trustees v Hart* in 1875[55]) were to be explained by a principle against the bad faith of a party knowing about the other's error and, by keeping quiet, taking advantage of that error, typically by way of getting a low price. Such an approach "creates the very degree of uncertainty which the requirements of business efficacy seek to avoid." Instead, in all cases of uninduced error, it had to relate "to a matter the accuracy of which was a term of the contract in the first place and was so important that its failure went to the root of the contract." The famous five

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[49] P Stein, *Fault in the Formation of Contract in Roman Law and Scots Law* (1957), 171-208.

[50] W W McBryde, "A History of Error", 1977 JR 1. Joe cites this article in "Effect of Error in Contract".

[51] *Mathieson Gee v Quigley* 1952 SC (HL) 38.

[52] *Stuart v Kennedy* (1885) 13 R 221.

[53] *Morrisson v Robertson* 1908 SC 332.

[54] Relatively recent examples of failed arguments on uninduced unilateral error at the time Joe was writing were *Brooker-Simpson v Duncan Logan (Builders) Ltd* 1969 SLT 304; *Steel v Bradley Homes (Scotland) Ltd* 1972 SC 48 (both Outer House decisions).

[55] *Steuart's Trustees v Hart* (1875) 3 R 192.

"substantials" of a contract to which an error had to relate as enunciated early in the nineteenth century by George Joseph Bell (parties, subject-matter, price, quality and nature of contract) were merely examples of terms going so to the root. In contrast, the *induced* error did not need to go to the root of the contract; it was enough that the misrepresentation caused the victim to enter it.

Joe would later revise this approach to the problem of unilateral uninduced error.[56] Instead of the accuracy of a matter of fact or law being a *term* of the contract, he argued instead that the accuracy of the matter in question was an implied suspensive *condition*. By this, he meant that the existence of the contract or its enforceability was suspended until the accuracy of the matter was determined. This effect was a question of the contract's construction, so again depended upon what it actually said, or its terms, or on what was implicit therein. Failure of the condition would release both parties or, if its accuracy is solely in the interests of one party, release that party unless it chose to waive the condition and seek implement.

An example Joe gave based on the famous case of *McRae v The Commonwealth Disposal Commission* (1951) 84 CLR 377 is helpful in trying to understand this approach:

> A enters into a contract with B to salvage a sunken ship in a particular location. Unknown to the parties, at the time the contract was made, there was no wreck at that location. There is objectively ascertained *consensus in idem*. However, it is an implied suspensive condition of the performance of the parties' obligations that the wreck, the subject-matter of their contract, exists. Since the wreck does not exist, the fulfillment of the suspensive condition is impossible. Because the suspensive condition has failed, both parties are relieved of performance of their obligations and can treat the contract as null.[57]

Further elaboration of the theory took place in 1992 in a commentary on the Outer House decision in *Angus v Bryden*.[58] B offered to buy "all the whole [certain fishing rights] in the River Ayr" and this was accepted by A. B thought the phrase included both river and sea fishings. B also knew from negotiations that A thought only the river fishings were being sold, but did nothing to alert A to the difference in their understandings. Lord Cameron of Lochbroom held that only the river fishings were to be conveyed. But the court said that, had the sea fishings been found also included in the sale, then A would have been labouring under what the judge called

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[56] "Suspensive and Resolutive Conditions in the Scots Law of Contract", in A J Gamble (ed), *Obligations in Context: Essays in Honour of Professor D M Walker* (1990) 126.
[57] Ibid, 135.
[58] *Angus v Bryden* 1992 SLT 884; J M Thomson, "Error Revised", 1992 SLT (News) 215. The article also commented on the unsuccessful pleas of error in *McCallum v Soudan* 1989 SLT 523; *Royal Bank of Scotland v Purvis* 1990 SLT 262; and (most critically) *Spook Erection (Northern) Ltd v Kaye* 1990 SLT 676.

an error in expression about the subject matter of the contract, known to and not corrected by B, and this would have made the contract reducible at A's instance. B's mistaken understanding gave rise to no such entitlement, however, since A had been unaware of B's understanding.

The case thus posed the problem of when uninduced unilateral error might invalidate a contract. Lord Cameron in part followed Joe's line, although without reference to it. The error was about the contract's subject-matter as described in a term of the contract. But Lord Cameron also cited the 1875 case of *Steuart's Trustees v Hart* as authority for the general proposition that taking advantage of another's error to make a contract with that party was a "wrong" for which the law provided the remedy of reduction of the contract. The case had been about a sale of land below its market value where the seller had negotiated the price on the basis that the sale would relieve him of the burden of feu-duty; but thanks to the title deeds this was not in fact the case. Lord Cameron also took into account Gloag's objection to *Steuart's Trustees*, which was founded on the example of the antiquarian bookseller offering a rare book at a price far below its market value and that offer being taken up by a purchaser with knowledge of that market value. Gloag thought that this contract should stand although "in all essential points such a case is on all fours with *Steuart's Trustees v Hart*."[59] But Lord Cameron did not agree that this meant that *Steuart's Trustees* was wrongly decided. The bookseller case was not an error in expression but one in intention: "the bookseller intends to sell the book and has fixed the price accordingly. In such an event if he sells too cheap, he is not by reason of his mistake protected from his loss."

Joe's commentary restated his view that *Steuart's Trustees* was not to be explained by notions of bad faith, advantage-taking and bargain-snatching. But he now accepted that a party's awareness of the other's error was a relevant consideration. But he emphasized the fact that the parties had engaged in extensive negotiations from which the buyer knew of the seller's purpose while also being aware that that purpose would not in fact be realized. This, Joe argued, was not the case with Gloag's bookseller: "The principle in *Steuart's Trs v Hart* would only give relief if B knew from negotiations that A was only prepared to sell the book for £50,000 but when A offered B the book A erroneously cited the price as £500." The absence of prior negotiations in which the seller made its objective clear to the purchaser was the crucial difference between Gloag's bookseller and the sellers in *Steuart's Trustees* and *Angus v Bryden*.

This then was the understanding of the law of error which found its way into *Contract Law in Scotland* and which remains there down to the current edition.[60] The book added one further elaboration: the label "error in transaction" to describe the requirement that an uninduced error (whether shared by the parties or unilateral) had to relate in some way to a provision in a contract going to its root.

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[59] Gloag, *Contract*, 438.

[60] *Contract Law in Scotland* (4th edn), chapter 4.35-4.66. See also *Scots Private Law*, chapter 5.15-5.18.

This was to be contrasted with an "error in motive", i.e. an error that caused a party to enter a contract, which had to be induced by a misrepresentation before it could used to invalidate the contract.

These labels were first used by the Scottish Law Commission when working on the subject in the late 1970s, although in a rather inconclusive fashion.[61] Their introduction was the responsibility of Robert Black, who drafted the text under the supervision of T B Smith as the responsible Law Commissioner. Robert tells me that he first encountered the concepts of errors in transaction and motive when studying for a postgraduate degree at the University of the Witwatersrand in South Africa in 1971.[62] The concepts were much more developed, however, in the account of error in volume 15 of the *Stair Memorial Encyclopaedia*, also written by Robert and published in 1996 (by when he had succeeded T B Smith as General Editor of the *Encyclopaedia* following the latter's death in 1988).[63] Joe was one of the Deputy General Editors of the *Encyclopaedia* from 1985. Robert recalls a working editorial lunch between him, Joe and T B Smith at which error was the subject of discussion, and the trio found themselves quite substantially, if not completely, in agreement about it.[64] The question of who influenced whom the most must be left as unanswerable at this distance of time; what seems clear is that Joe picked up the terminology for error in transaction and error in motive via the work on the *Encyclopaedia*.

I can more confidently confirm that the analysis of error now to be found in *Gloag & Henderson* is indeed strongly influenced by Joe's theories.[65] It has also been reinforced by a further Outer House decision in *Wills v Strategic Procurement Ltd*.[66] The contract was one to settle an action in Aberdeen Sheriff Court. W thought that the effect of the agreement would be to allow the action to be re-raised in the English High Court in London. But the language of the settlement contract described it as "absolving" the defender, giving it the legal effect that ***no*** further action could be taken anywhere. Wills' claim that Strategic Procurement had known about his error and said nothing about it in order to take advantage was held to be relevant,

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[61] Memorandum No 42, Defective Consent and Consequential Matters (2 vols, 1978) vol 1 paras 1.14, 1.28-1.30; vol 2 paras 3.45-3.49. This was not available to Joe before his 1978 article was published. He does however refer approvingly to Memorandum No 37, Constitution and Proof of Voluntary Obligations: Abortive Constitution (1977).

[62] Personal email dated 28 November 2018.

[63] *Laws of Scotland: Stair Memorial Encyclopaedia*, vol 15 (1996), paras 686-693.

[64] Personal email dated 28 November 2018. It should be said that Joe often told me that he became much more reconciled to T B Smith personally in consequence of their editorial collaboration on the Encyclopaedia. Joe was General Editor of the Encyclopaedia reissues from 1996 to 1999.

[65] See H L MacQueen and Lord Eassie (eds), *Gloag & Henderson The Law of Scotland* (14th edn, 2017) paras 7.21-7.31. Note also C Twigg-Flessner, R Canavan and H L MacQueen (eds), *Atiyah and Adams' Sale of Goods* (13th edn, 2016), 44-48.

[66] *Wills v Strategic Procurement Ltd* [2013] CSOH 26, 2016 SC 367.

i.e. legally permissible, in an action to reduce the settlement. Wills' error, being about the effect of a term in the agreement, was in transaction, or, as counsel for Wills put it, about what he was doing as distinct from about why he was doing it. Lord Malcolm cited Joe's 1992 commentary on *Angus v Bryden* and allowed a proof in which the parties' negotiations and what they respectively knew could be explored in depth.

In conclusion, I think it can be seen that despite his rejection of the "neo-Civilian" approach and legal nationalism, and despite his arguments that modern law could not be expounded in a systematic and coherent way, and that its substantive content did not matter, Joe was actually a doctrinalist and systematiser of a very high order, at least in relation to contract law. From the beginning of his career, his intellectual energies were devoted to rendering complex areas of contract law into systematic and coherent rules and to clearing away fuzziness and scope for judicial discretion. In that process, he drew heavily upon his deep knowledge and understanding of English law; but his views on that were not necessarily orthodoxy south of the border either, and he could not be accused of being an unthinking Angliciser in the context of Scots law. Rather, for him contract law was a matter of applied rationality in both jurisdictions, and it should therefore not be surprising if they came to similar conclusions in not dis-similar ways. Joe's highest word of praise for somebody or something – and I can hear him saying it now – was to say it was "clever", sometimes "very clever". In my estimation, however, Joe Thomson was very, very clever.